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No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

DOUGLAS CLYDE MACINTOSH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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DOUGLAS CLYDE MACINTOSH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on July 7, 1930.

QUESTION PRESENTED

Whether an alien who, upon his examination in court, stated that he would be unwilling to bear arms in defense of the United States unless he believed "that the war was morally justified," and who reserved to himself the right to judge the necessity for taking up arms, is entitled to naturalization.

STATUTE INVOLVED

Section 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596 (U. S. C., Title 8, Sections 372, 381, and 382), reads in part as follows:

> That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:
>
> * * * * *
>
> *Third.*—He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.
>
> *Fourth.*—It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well dis-

posed to the good order and happiness of the same * * *.

STATEMENT

The respondent, a Canadian citizen, originally entered this country in 1904. In 1907 he was ordained as a Baptist preacher, whereupon he returned to Canada for two years. In 1909 he returned to the United States as a member of the faculty of Yale University, and soon thereafter declared his intention to become a citizen of the United States. (R. 14–15.) He served as a Canadian chaplain in the late war. (R. 15.) His war service apparently prevented the perfection of his American citizenship prior to the time when his original declaration under the Naturalization Act became invalid. (R. 16.) In February, 1919, he filed a new declaration of intention (R. 16), and on March 18, 1929, he filed in the United States District Court for the District of Connecticut his petition for naturalization (R. 7).

Questions 20 and 22 of the Preliminary Form for Petition for Naturalization executed by the respondent and the respondent's answers thereto are as follows (R. 5):

20. Have you read the following oath of allegiance? Yes.

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince,

potentate, state or sovereignty, and particularly to _____, of whom I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same."

Are you willing to take this oath in becoming a citizen? Yes.

22. If necessary, are you willing to take up arms in defense of this country? Yes; but I should want to be free to judge of the necessity.

In a memorandum submitted to the District Court and utilized at the hearing on the petition for naturalization, the respondent amplified his answers to questions 20 and 22 as follows (R. 11–12 and 17):

I wish to make clear the interpretations which I must put upon questions 19, 20 and 22 in the "Preliminary Form for Petition for Naturalization" if I am to be able to answer these questions in the affirmative. * * *

20 and 22. I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do *not* undertake to support "my country, right or wrong," in any dispute which may arise, and I am *not* willing to promise beforehand, and

without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defence of this country," however "necessary" the war may seem to be to the government of the day. It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the government of the United States "against all enemies foreign and domestic." But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say "Yes" in answer to these two questions. * * *

Further elaborating his views at the hearing the respondent stated (R. 19)—

That he would answer question 22 in the affirmative only on the understanding that he would have to believe that the war was morally justified before he would take up arms in it or give it his moral support.

The "Statement of Facts" further recites that (p. 21–22):

* * * while the applicant did not anticipate engaging in any propaganda against the prosecution of a war which the government had already declared and which it considered to be justified, he preferred not to make any absolute promise at the time of the hearing because of his ignorance of all the circumstances which might affect his

judgment in reference to such a war. In any case he did not question that the government, under certain conditions, could regulate and restrain the conduct of the individual citizen even to the extent of imprisonment. The applicant recognized the principle of the submission of the individual citizen to the opinion of the majority in a democratic country but he did not believe in having his own moral problems solved for him by the majority. The applicant testified that the position taken was the only one he could have taken consistently with his moral principles and with what he understood to be the moral principles of Christianity.

* * * * *

In short, while he recognized the right of the government to restrain the freedom of the individual for the good of the social whole, he was convinced, on the other hand, that the individual citizen should have the right respectfully to withhold from the government his military services (involving, as they probably would, the taking of human life), when his best moral judgment would compel him to do so. The applicant was willing to support his country even to the extent of bearing arms, if asked to do so by the government, in any war which he could regard as morally justified.

The District Court denied the petition for naturalization on the ground that respondent's views with respect to bearing arms indicated he was "not

attached to the principles of the Constitution." (R. 27.) On appeal the judgment was reversed by the Circuit Court of Appeals (R. 45) on the ground that "the refusal to perform military service on account of religious scruples has not been regarded as inconsistent with the duties and obligations of citizenship" (R. 42).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In reversing the judgment of the trial court.

2. In holding that the respondent was entitled to be admitted to citizenship.

3. In holding that the statutory requirements for naturalization were met by the respondent's qualified acceptance of the oath of allegiance prescribed by Section 4 of the Naturalization Act.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is apparently in conflict with the decision of this Court in *United States* v. *Schwimmer*, 279 U. S. 644.

2. Because of the large alien population residing in the Second Circuit, the decision of the Circuit Court of Appeals opens the way for the creation of a class of citizens who reserve to themselves the right to determine whether any future war in which the United States is involved deserves their moral support and justifies their taking up arms in defense of the United States.

3. The decision of the Circuit Court of Appeals authorizes admission to citizenship upon a declaration of conditional or qualified acceptance of the oath required by Section 4 of the Naturalization Act.

4. A review of the decision of the court below is of importance in the administration of the Naturalization Act.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1930.

BRIEF IN SUPPORT OF PETITION

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 40–44) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered on July 7, 1930. (R. 45.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTE INVOLVED, ETC.

A statement of the question presented, statute involved, assignment of errors relied upon, and a statement of the case will be found in the petition.

ARGUMENT

Section 8, Article I, of the Constitution of the United States provides that Congress shall have power "to establish a uniform Rule of Naturalization."

Section 4 of the Naturalization Act of June 29, 1906 (p. 2, *supra*), provides:

> That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise: * * *.

The third subdivision of this Section (p. 2, *supra*) provides that an applicant for naturalization—

> * * * shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; *that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.* (Italics ours.)

It has been repeatedly held that the right of an alien to acquire citizenship is purely statutory and that citizenship will not be granted to an alien unless there has been strict compliance with the statutory requirements. *Maney* v. *United States,* 278 U. S. 17, 22; *Zartarian* v. *Billings,* 204 U. S. 170, 175; *United States* v. *Ginsberg,* 243 U. S. 472, 475; *Iuria* v. *United States,* 231 U. S. 9, 23; *Johannessen* v. *United States,* 225 U. S. 227, 240; *United States* v. *Ness,* 245 U. S. 319.

In *Johannessen* v. *United States, supra,* this Court quoted with approval the following language (p. 240):

> An alien friend is offered under certain conditions the privilege of citizenship. He

> may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred.

The same principle was enunciated in the *Ginsberg case, supra*, where this Court said (p. 474):

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

Although in his preliminary petition for naturalization the respondent said he was willing to take the oath required by the statute, he qualified his promise to "support and defend the Constitution and laws of the United States" by saying that he would take up arms in defense of the United States only when he deemed this necessary. In explanation of his "acceptance" of the statutory oath, the respondent said (R. 11–12.):

> I do *not* undertake to support "my country, right or wrong," in any dispute which may arise, and I am *not* willing to promise beforehand, and without knowing the cause for which my country may go to war, either

that I will or that I will not "take up arms in defence of this country," however "necessary" the war may seem to be to the government of the day. It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the government of the United States "against all enemies foreign and domestic."

Not only did the respondent reserve to himself the right to determine the necessity for taking up arms in defense of the United States but he also reserved to himself the right to determine whether he would engage in propaganda against the prosecution of any war which he might not deem morally justified. The "Statement of Facts" shows that (R. 21):

> * * * while the applicant did not anticipate engaging in any propaganda against the prosecution of a war which the government had already declared and which it considered to be justified, he preferred not to make any absolute promise at the time of the hearing because of his ignorance of all the circumstances which might affect his judgment in reference to such a war.

Under the decisions cited the sole question to be determined is whether the respondent has met the requirements of the statute. We submit that the respondent's qualified oath of allegiance does not satisfy the Naturalization Act. In *United States* v. *Schwimmer*, 279 U. S. 644, this Court said (p. 650):

> That it is the duty of citizens by force of arms to defend our government against all

enemies whenever necessity arises is a fundamental principle of the Constitution.

The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several States when called into the service of the United States; it declares that a well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws by armed citizens. * * *

* * * * * *

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number

> of citizens oppose such defense the "good order and happiness" of the United States can not long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms.

The foregoing decision negatives the contention of the respondent that he is entitled to citizenship although he refuses to bear arms in defense of the United States unless he is able to satisfy himself that the particular war is necessary or morally justified. If, as said by this Court in the *Selective Draft Law Cases*, 245 U. S. 366, 378, "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it," there is no basis for the contention that a prospective citizen may reserve to himself the right to determine the need or the moral justification for such miltary service.

The court below sustained the respondent's claim to citizenship on the ground that the refusal to perform military service on account of religious scruples has not been regarded as inconsistent with the duties of citizenship, and that no more is demanded of an alien who becomes a citizen than of a natural-born citizen. We submit that these considerations are irrelevant. The test is not what rights are per-

mitted to citizens after citizenship has been acquired but what requirements are imposed by the naturalization statutes. The fact that Congress in enacting the Selective Draft Law, or in prior legislation, provided that persons who were already citizens and as members of religious sects had conscientious scruples against military service should be given noncombatant duties does not indicate a legislative intent in the Naturalization Act that aliens who reserve to themselves the right to determine when military service should be rendered, or the right to determine when war shall receive their moral support, shall be admitted to citizenship. Those conscientious objectors whom we have among our citizens are dealt with in the best way possible, but the naturalization statutes afford no ground for inferring that Congress intended to show the slightest tolerance for the individual views of alien applicants which might interfere with full and complete performance of the duties of citizenship. See *In re Roeper*, 274 Fed. 490 (D. Del.).

The attitude of Congress as to admission to citizenship and military service is indicated by the Act of July 9, 1918, c. 143, 40 Stat. 845, 885 (U. S. C., Title 8, Sec. 366):

> That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the

President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.

The Naturalization Act requires that "it shall be made to appear to the satisfaction of the court admitting any alien to citizenship" that he has the prescribed qualifications. The District Court was not satisfied with the proof submitted by the respondent and denied him citizenship. It may not be said as a matter of law that the respondent conclusively established his right to admission and therefore the Circuit Court of Appeals was without authority to substitute its judgment for that of the District Court. On this point this Court said in the *Schwimmer case* (p. 649):

> Every alien claiming citizenship is given the right to submit his petition and evidence in support of it. And, if the requisite facts are established, he is entitled as of right to admission. On applications for naturalization, the court's function is "to receive the testimony, to compare it with the law, and to judge on both law and fact." *Spratt* v. *Spratt*, 4 Pet. 393, 408. We quite recently declared that: "Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant." *United States* v.

Manzi, 276 U. S. 463, 467. And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

See also *Petition of Robert Clarke*, decided by the Supreme Court of Pennsylvania on June 21, 1930 (Western District, No. 56, March Term, 1930; unreported), in which case naturalization was denied because the applicant desired to add to the oath of allegiance the words "so far as they are in accord with the moral law of Jesus Christ."

CONCLUSION

Under the decision of this Court in the *Schwimmer case*, it seems clear that the court below erred in reversing the judgment of the District Court and in directing that the respondent be admitted to citizenship. The question involved is one of general importance, and it is respectfully submitted that the petition for a writ of certiorari should be granted.

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OCTOBER, 1930.

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